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Supreme Court, U.S.
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NO. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MICHAEL J. CRAWLEY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS,
TWELFTH APPELLATE DISTRICT,
WARREN COUNTY, OHIO.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether it is a violation of the U.S. Constitution to retroactively apply United States vs. Dixon, 509 U.S. —, 113 S. Ct. 2849 (1993), to deprive a criminal defendant of a "same conduct" double jeopardy defense on conduct identical to and which occurred during the legal validity of Grady vs. Corbin, 495 U.S. 508 (1990), a decision upon which said Defendant relied to his detriment.

II. Whether the definition of "serious physical harm," an essential element of the charge of "aggravated vehicular assault" under the Ohio Revised Code, which is based upon the degree of subjective pain experienced by or risk of death to an injured person, is unconstitutionally vague.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

Pursuant to Sup. Ct. R. 14.1(b) and Sup. Ct. R. 29.1, the Petitioner states that there are no other parties to the proceeding in the Court whose judgment is sought to be reviewed other than the names of all of the parties appearing in the caption of this case. There are no corporate parties.

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MICHAEL J. CRAWLEY, Petitioner,

vs.

STATE OF OHIO, Respondent.

PETITION FOR WRIT OF CERTIORARI

REPORTS OF OPINIONS IN THE CASE

The Opinion of the Ohio Court of Appeals which is sought to be reviewed in this case is reported at State vs. Crawley, 96 Ohio App.3d 149, 644 N.E.2d 724 (1994). A copy of said Decision appears at Appendix A.

The decision of the Ohio Supreme Court denying discretionary review, State vs. Crawley, Case No. 94-1829 (Dec. 7, 1994), is unreported, but is listed at 642 N.E.2d 386, 71 Ohio St.3d 1420 (1994). Said Entry is reprinted at Appendix B.

The Decision of the trial court in this case, State vs. Crawley, Case No. 92CR15579 (War. Com. Pl. Ct.,

Aug. 17, 1993), is also unreported. The Decision is reprinted at Appendix C.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed in this case was entered on July 18, 1994, and discretionary review by the Ohio Supreme Court was denied December 7, 1994. No orders concerning rehearing and no orders granting an extension of time within which to file a Petition for Writ of Certiorari have been granted. Jurisdiction to review the judgment or decree in question by Writ of Certiorari is conferred on this Court by Title 28 U.S.C. Section 1257(a), as seeking review of a final judgment by the highest court in the State of Ohio in which a decision could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory

provisions, in pertinent part, are addressed in this Petition:

> 1. No Bill of Attainder or ex post facto Law shall be passed.

U.S. Const. Art. I, Section 9, Cl. 3.

> 2. No state shall . . . pass any . . . ex post facto Law . . . .

U.S. Const. Art. I, Section 10, Cl. 1.

> 3. Congress shall make no law . . . abridging the freedom of speech, ...

U.S. Const. amend. I.

> 4. No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

U.S. Const. amend. V.

> 5. In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> 6. Nor shall any state deprive any person of life, liberty, or property, without due process of law;

U.S. Const. amend. XIV, Section 1.

> 7. (E) "Serious physical harm to persons" means any of the following:
>
> (2) Any physical harm which carries a substantial risk of death;
>
> (5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

O.R.C. Section 2901.01(E)(2), (5).

> 8. (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snow mobile, locomotive, water craft, or aircraft, shall recklessly cause serious physical harm of the type described in Division (E)(2) or (5) of Section 2901.01 of the Revised Code to another person.

O.R.C. Section 2903.08(A).

> 9. No person shall operate a motor vehicle, trackless trolley, or street car on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle, trolley, or street car.

O.R.C. Section 4511.202.

STATEMENT OF THE CASE

According to Grady vs. Corbin, 495 U.S. 508 (1990), on October 3, 1987, the defendant Corbin drove his automobile across the double yellow line of a public highway, striking an oncoming vehicle and causing serious injuries. He was served with two traffic tickets, including "failure to keep right of the median." A little over three weeks later, he plead guilty to the traffic tickets, and, approximately one month later, was sentenced on them.

Two months later, on January 19, 1988, he was indicted by a grand jury in regard to that same accident, charging him, among other things, with criminally negligent homicide and third degree reckless assault. The Bill of Particulars filed in that case identified the reckless and/or criminally negligent conduct as including the failing to keep right of the median.

Corbin moved to dismiss the indictment on constitutional double jeopardy grounds, which was

affirmed by this Court, on May 29, 1990, establishing a "same conduct" double jeopardy defense. Grady, supra at 511-515. Grady was reaffirmed in United States vs. Felix, 503 U.S. —, 118 L.Ed.2d 25 (1992).

On October 16, 1992, two and a half years after the Corbin decision was released, the Petitioner in the case now before the Court, Michael J. Crawley, also drove his automobile across the double yellow line, striking an oncoming vehicle, and causing serious injury. Crawley was also charged with traffic violations, including "failure to control" his automobile. On October 22, 1992, Crawley entered a no contest plea to that traffic charge, was found guilty, and on November 2, 1992, was sentenced to fines and court costs which he paid in full on November 10, 1992.

Approximately two months later, on January 4, 1993, Mr. Crawley was indicted by the grand jury of Warren County, Ohio for one count of aggravated

vehicular assault. The Bill of Particulars and testimony of the charging officer confirmed that the Indictment was based upon the exact same conduct as that for which he was previously convicted.

Aggravated vehicular assault under Ohio law punishes one who "shall recklessly cause serious physical harm of the type described in Division (E)(2) or (5) of Section 2901.01 of the Revised Code to another person." Those two provisions define serious physical harm as "any physical harm which carries a substantial risk of death" or "any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain."

On April 20, 1993, the Trial Court issued a decision and judgment overruling the Defendant's Motion to Dismiss based upon the double jeopardy clause and Grady vs. Corbin. The Court though later

reconsidered that decision (after hearing more evidence of the prosecution's case in a Motion to Suppress), and on August 17, 1993, granted the judgment and dismissed the indictment. The State appealed.

In the interim between the two Trial Court decisions, on July 28, 1993, this Court decided United States vs. Dixon, 509 U.S. —, 125 L.Ed.2d 556 (1993), overruling and reversing Grady vs. Corbin.

This Petitioner raised the federal questions now sought to be reviewed originally at the trial court level, by filing a Motion to Dismiss based upon the double jeopardy clause and the vagueness of the statute. The Trial Court eventually granted the Defendant's Motion to Dismiss based on double jeopardy, but overruled the motion based upon the vagueness of the statute. The State appealed the decision of the Trial Court and then for the first time raised the issue of the application of United States vs. Dixon. Crawley's response included,

again, raising the issues as presented in this case, and other issues not now before the Court. The Court of Appeals reversed the decision of the Trial Court on the double jeopardy issue, but did not address the vagueness issue. The Petition for discretionary review to the Ohio Supreme Court raised the same two issues. Review was denied on December 7, 1994 (within 90 days of the filing of this petition).

In compliance with S. Ct. R. 14.1(h), the Court would be referred to "Defendant's Motion to Dismiss Indictment," filed March 19, 1993, in the Trial Court, containing both issues now presented to the Court as being raised therein:

> This indictment is barred by the double jeopardy clauses to the United States and Ohio Constitutions.
>
> The elements of "serious physical harm" necessary to establish a conviction for aggravated vehicular assault are unconstitutional on their face and void for vagueness.

Mr. Crawley's Brief in the Court of Appeals presented the same two issues:

> The "same conduct" test of Grady vs. Corbin, which was in effect at the time of the conduct for which this Defendant is charged, is applicable to the Defendant's conduct, as application of an overruling case retroactively to the Defendant's conduct is a denial of due process of law and a violation of the ex post facto clause of the United States Constitution.
>
> According to the law in effect at the time of the Defendant's conduct, the subsequent prosecution for the felony offense is a violation of the double jeopardy clause of the Ohio and the United States Constitutions.
>
> An indictment for aggravated vehicular assault should be dismissed because the elements of "serious physical harm" necessary to establish a conviction are unconstitutional on their face and void for vagueness.

Crawley's Memorandum in Support of Jurisdiction in the Ohio Supreme Court, again, raised the same issues in two Propositions of Law:

> Proposition of Law No. I: Retroactive application of a United States Supreme Court decision changing the substance of the defense of double jeopardy deprives a criminal

defendant of a defense which he had at the time of his conduct and is a denial of due process of law and a violation of the ex post facto clause of the United States and Ohio Constitutions.

Proposition of Law No. II: The elements of "serious physical harm" necessary to establish a conviction for aggravated vehicular assault are unconstitutional on their face and void for vagueness.

REASONS FOR ALLOWANCE OF THE WRIT

I. Summary of Argument

Pursuant to S. Ct. R. 14.1(j) and S. Ct. R. 10.1(c), this Petition presents important questions of federal law which should be but have not been decided by this Court. Other courts have decided these issues, in relation to the double jeopardy clause, in conflict with the relevant decisions of this Court. The lower courts in this case, and other courts, misapply the important constitutional questions raised resulting in the denial to this Petitioner of his rights under the Constitution, as

pronounced by the relevant decisions of this Court.

The Petitioner in this case has been punished for the conduct committed two and a half years after release of the decision of Grady vs. Corbin by this Court, during its validity, and in complete reliance upon it. The facts of Grady vs. Corbin are almost identical with the facts now before this Court. The legal precedent of that Decision was not changed by this Court until close to nine months after Crawley's conduct, which, as his case now stands, retroactively prevents him from using a defense established by this Court, upon which he relied.

The retroactive application of United States vs. Dixon to Crawley acts as a slap in the face to anyone who relies upon the important precedents of this Court, which may change from time to time beyond his control, and certainly beyond his or his counsel's or anyone else's prediction. Such

defendants are told that they rely upon the decisions of this Court at their own risk, that relying upon the decisions from this Court is not reasonable as they may change from time to time without any advance warning and to one's detriment, and that one should not rely upon the decisions of this Court without being willing to take the risk that they would be completely abandoned, and have that abandonment retroactively applied to them, although they have relied upon this Court to their prejudice and detriment; all contrary to the purpose of the Constitution, the double jeopardy clause, and having a "highest court in the land." This is a burden that this Petitioner should not bear, and only this Court allowing the Writ of Certiorari to review this case can prevent that from happening.

Further, the statutes sought to be addressed by this Court are completely unconstitutional as

imposing punishment upon an individual based upon the subjective pain and unknowable risk of death experienced by the injured person. At least two other states have enacted similar statutes. New York Penal Law Section 120.03, 120.04; Penn. C.S.A. Title 18 Section 2702.

The allowance of the Writ in this case can clarify for all other states who have enacted or are considering enacting a similar statute. Such a statute strikes at the heart of this Court's previous decisions prohibiting the imposition of criminal penalties upon one who has no possible way of knowing the illegal results of their conduct or conforming their conduct to the law, or knowing that such conduct will be in violation of such a subjective statute.

II. First Question Presented for Review: Retroactive elimination of a double jeopardy defense based on a

decision of this Court which is relied upon as a defense in a criminal case.

At the time of the accident in which this Petitioner was involved the Grady decision allowed a "same conduct" double jeopardy defense, which this Petitioner took full advantage of. Reliance upon a current judicial doctrine is one of the grounds for deciding against the retroactivity of a constitutional interpretation. See, e.g., Griffith vs. Kentucky, 479 U.S. 314, 320 (1987); Linkletter vs. Walker, 381 U.S. 618, 636 (1965); Stovall vs. Denno, 388 U.S. 293, 297 (1967). In Bouie vs. Columbia, 378 U.S. 347 (1964), this Court explained the application of the ex post facto clause to judicial decisions:

> The fundamental principle that the required criminal law must have existed when the conduct in issue occurred, [citations omitted], must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.

Id. at 353-354.

In Beazell vs. Ohio, 269 U.S. 167 (1925), this Court confirmed that the type of decision which is prohibited as ex post facto is that "which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." Id. at 169-170 (emphasis added). Applying this doctrine in Bouie, a trespass conviction of two black college students, which was affirmed on appeal based on the judicial change in the law from what was in effect at the time of the offense, but later changed by the State Supreme Court, was reversed. Id.

The more modern decisions of this Court confirm and mandate that the decisions below resulting in this Petitioner's indictment being reinstated must also be reversed. Any change, even if termed procedural, which works to the

disadvantage of an accused in a criminal case, is an ex post facto violation if it "affect[s] matters of substance," by depriving a criminal defendant of "substantial protection with which the existing law surrounds the person accused of crime," or which arbitrarily infringes upon "substantial personal rights." Collins vs. Youngblood, 497 U.S. 37, 45 (1990). Collins cited the older case of United States vs. Hall, 26 F.Cas. 84, 86 (D. Pa. 1809), which held that retroactively applying a change in the law to a criminal defendant was ex post facto because it abolished an affirmative defense after the act was done. Collins, supra at 49. In Collins, a Texas statute which allowed correction of a jury verdict after the fact, was applied retroactively and determined not to be a violation of the ex post facto clause, because that changed "not a right that had anything to do with the commission of crimes, defenses, or

punishments, which is the concern of the ex post facto clause." Collins, supra at 51 (emphasis added).

The establishment of the same conduct double jeopardy defense is a defense, and retroactive deprivation of that defense is also a violation of the ex post facto clause. The Court of Appeals Decision which is in question now determined that the "same conduct" double jeopardy defense was not a "defense" subject to ex post facto analysis. This Court in Beazell stated that ex post facto prohibits any law that "deprives one charged with crime of any defense available according to law at the time when the act was committed." Beazell, supra (emphasis added); Collins, supra at 42. This Court then determined that the "Beazell formulation is faithful to our best knowledge of the original understanding of the ex post facto clause . . . ." Collins, supra at 43.

The Court of Appeals' decision in this case is

contrary to this Court's precedents. None of the other courts which applied Dixon retroactively addressed a fact pattern so identical to Grady vs. Corbin; the degree of reliance by the particular defendant upon Grady vs. Corbin was therefore subject to question. In this case, the facts between Crawley's conduct and Corbin's conduct are almost identical, therefore providing substantial and great justification for his reliance upon the defense that case provided. Even Dixon, in United States vs. Dixon, was charged in a series of assault and domestic-violence type offenses, making reliance on Grady vs. Corbin a factor in the case.

The only other case (known to counsel) which sought a writ of certiorari on the issue of retroactivity of United States vs. Dixon is State vs. Kurzawa, 509 N.W.2d 712 (Wis. 1994), cert. denied, 129 L.Ed.2d 839 (1994). That case also presented dissimilar facts,

involving bank fraud and forgery and related such offenses, and that defendant's conduct occurred prior to this Court's announcement of the decision in Grady. The Wisconsin Supreme Court specifically commented that its decision may have been different, but for the fact that Kurzawa's conduct occurred prior to Grady; retroactive application of Dixon "merely places Kurzawa in the position he faced when he engaged in his suspect activity." Kurzawa, supra at 514-515 n.5.

This court granted certiorari on the retroactive application of a commerce clause ruling that potentially could bar a personal injury negligence action. Reynoldsville Casket Co. vs. Hyde (No. 943). The issues for Mr. Crawley are at least as compelling.

Other courts have supported the Petitioner's argument. Both the Fifth Circuit of the Federal Court of Appeals and the Texas Court of Appeals have

determined that retroactive abandonment of a "same transaction" test for double jeopardy purposes violated due process. Rubino vs. Lynaugh, 845 F.2d 1266 (5th Cir. 1988); Clay vs. Lynaugh, 846 F.2d 8 (5th Cir. 1988); Ex Parte Scales, 853 S.W.2d 586 (Tex. Cirm. App. 1993). See also, Marks vs. United States, 430 U.S. 188, 191-192, 196 (1977) (obscenity standard was narrowed in Miller vs. California, 413 U.S. 15 (1973), was not retroactively applied to conduct occuring before Miller); People vs. Patton, 309 N.E.2d 572, 574-75 (Ill. 1974) (decision finding "ticket scalping" statute unconstitutional, later overruled, applies to defendant's conduct prior to the overruling decision); State vs. O'Neil, 126 N.W. 454 (Iowa 1910); Commonwealth vs. Trousdale, 181 S.W.2d 254, 257 (Ky. 1994); State vs. Longino, 67 So. 902 (Miss. 1915); State vs. Koonce, 214A.2d 428, 436-437 (N.J. 1965) (decision upholding right of self-

defense to an unlawful arrest, later overruled, still available as a defense to conduct occurring prior to the overruling decision); State vs. Jones, 107 P.2d 324, 329 (N.M. 1940); State vs. Bell, 49 S.E. 163, 164-65 (N.C. 1904); State vs. Stout, 210 P.2d 199, 203-04 (Ok. 1949); Laabs vs. Wisconsin Tax Commission, 261 N.w. 404 (Wis. 1935).

Judge Learned Hand explained it well:

> The question turns upon how much violence is done to instinctive feelings of justice and fair play. For the State to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest.

Falter vs. United States, 23 F.2d 420, 425-26 (2nd Cir. 1928), cert. denied, 277 U.S. 590 (1928). See also: Hartung vs. People, 26 N.Y. 167 (1863) (defendant having once been adjudged to be legally free from punishment for her offense, act permitting her reprosecution prohibited by ex

post facto clause).

Retroactive application of Dixon undermines the very purpose of the double jeopardy clause. It is impossible for anyone to feel comfortable in the protection of the Constitution, see Green vs. United States, 355 U.S. 184, 187-188 (1957), when that protection may be nullified retroactively at virtually any minute with a change in composition of this Court.

Justice Scalia said it plainly:

> Justice Story said that "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." [Citation omitted]. The United States Constitution itself so far reflects these sentiments that it proscribes all retroactive application of punitive law [citations omitted], and prohibits (or requires compensation for) all retroactive laws that destroy vested rights. [Citations omitted].

Kaiser Aluminum vs. Bonjorno, 494 U.S.

827, 855-56 (1990) (Scalia, J., concurring).

The Ohio Supreme Court, rejecting discretionary review, with the Chief Justice dissenting, has deferred to this Court to be the one to alter Mr. Crawley's situation. Grady provided an absolute defense on identical facts. He relied upon it as a defense. It was taken away from him after the fact. Now, without this Court's intervention, he is forced a second time to be tried on the same conduct, although precedents of this Court at the time of his acts said "no, he was entitled to the double jeopardy defense once he is convicted of the traffic offense."

Only by this Court granting the writ can this substantial injustice, which directly resulted from reliance upon one of this Court's decisions, be undone.

III. Second Question Presented for Review: The

constitutionality of criminal statutes punishing conduct based upon the unspecified risk of death or subjective degree of pain experienced by an injured person.

Statutory attacks based on vagueness and overbreadth are especially favored when they involve criminal statutes. Standards for vagueness "require more precision in a criminal context than in other situations, such as in a regulatory context," in order that "where there is ambiguity in a criminal statute, doubts be resolved in favor of the defendant." United States vs. Bass, 404 U.S. 336, 348 (1971).

> Vague laws offend several important values. First, . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit

> standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Grayned vs. City of Rockford, 408 U.S. 104, 108-109 (1972) (citations omitted) (emphasis added).

Ohio Revised Code Section 2903.08(A) provides that aggravated vehicular assault can only be proven if the defendant recklessly causes "serious physical harm", as defined only in Sections 2901.01, as "any physical harm which carries a substantial risk of death; or any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain."

There is no requirement that an objective

(or any other) standard be employed for determining the degree of pain or risk of death. It is therefore difficult, if not impossible, to find an ascertainable standard by which people can judge what it is they are prohibited from doing. Only a physician can determine what kind of harm carries that risk of death (except in the case of the intent to cause death, which is not the case now before the Court), or knows what conduct might inflict upon another that specific degree of pain.

More important is "the requirement that a legislator establish minimal guidelines to govern law enforcement." Kolender vs. Lawson, 461 U.S. 352, 357-58 (1983). "Where the legislature fails to provide such minimal guidelines, the criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to

pursue their personal predelection." Id. at 358. That type of statute, and the statute at bar is a perfect example, is constitutionally impermissible. Id.

There is also no objective basis for an officer to charge, a judge to instruct a jury, and a jury to decide, what standard to impose upon a defendant.

IV. Conclusion

For all of the above reasons, and more, the Petitioner respectfully requests this Court to grant a writ of certiorari.

Respectfully Submitted,
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APPENDIX A

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	CASE NO. CA93-09-072
	:	MEMORANDUM DECISION
- VS -	:	AND
	:	JUDGMENT ENTRY
	:	7/18/94
MICHAEL J. CRAWLEY,	:	
Defendant-Appellee/ Cross-Appellant.	:	

Timothy A. Oliver, Warren County Prosecuting Attorney, Robert D. Karl, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellant/cross-appellee

Thomas G. Eagle Co., L.P.A., Thomas G. Eagle, 373 S. Dixie Highway, Franklin, Ohio 45005, for defendant-appellee/cross-appellant

Per Curiam. This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Warren County Court of Common Pleas, and upon the briefs and oral arguments of counsel. Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App.R. 12(A) as follows:

Plaintiff-appellant/cross-appellee, the state of Ohio, appeals a decision of the Warren County Court of Common Pleas dismissing the indictment against defendant-appellee/cross-appellant, Michael J. Crawley, on double jeopardy grounds.

On October 16, 1992, appellee went left of center and collided head-on with another vehicle, severely injuring its occupants. Appellee was cited for operating a motor vehicle without reasonable control in violation of R.C. 4511.202. He entered a plea of no contest

to this charge in the Warren County Court and was found guilty.

Appellee was subsequently indicted for aggravated vehicular assault in violation of R.C. 2903.08(A) with a specification of physical harm pursuant to R.C. 2941.143. Appellee filed a motion to dismiss the indictment claiming that it was barred by the Fifth Amendment since he had already been placed in jeopardy, and that the physical harm specification was void for vagueness. The trial court originally overruled the motion. It also overruled appellee's motion to suppress a blood test and statements appellee made to the police.

Subsequently, appellee filed a motion for reconsideration of his motion to dismiss. After considering that motion, the trial court granted appellee's motion to dismiss on double jeopardy grounds, finding that the same conduct supported both the charge of failure to control and the element of recklessness in aggra-

vated vehicular assault. The state filed a timely appeal from the trial court's decision granting the motion to dismiss, and appellee filed a cross-appeal from the decisions overruling his motions to suppress.

In its sole assignment of error, the state contends that the trial court erred in dismissing the indictment. It argues that the trial court relied upon the "same conduct" test set forth in Grady v. Corbin (1990), 495 U.S. 508, 110 S.Ct. 2084, which has been abandoned by the U.S. Supreme Court. We find this assignment of error to be well-taken.

In Grady, the United States Supreme Court stated that a court must first apply the traditional comparison of the elements test set forth in Blockburger v. United States (1932), 284 U.S. 299, 52 S.Ct. 180, in determining whether a subsequent prosecution is barred by the Double Jeopardy Clause. In Blockburger the court had stated that "[t]he applicable rule is that,

where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Id. at 304, 52 S. Ct. at 182.

However, the court in Grady went on to find that the Blockburger test is not the only standard for determining whether successive prosecutions violate the Double Jeopardy Clause. Id. at ___, 110 S.Ct. at 2092. It stated:

> *** the Double Jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of the offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. ***

Id. at ___, 110 S.Ct. at 2093.

The United States Supreme Court subsequently overruled Grady in United States v. Dixon (1993), ___U.S.___, 113 S.Ct. 2849, and returned to using the Blockburger test only. It found that the "same conduct" test applied in Grady "is wholly inconsistent with earlier supreme court precedent and with the clear common-law understanding of double jeopardy." Id. at____, 113 S.Ct. at 2860.

The trial court relied upon the "same conduct" test set forth in Grady in dismissing the indictment. The state argues that Dixon applies, and therefore the court should not have applied the "same conduct" test. Appellee argues that Dixon was not decided until almost a year after the accident and cannot be applied retroactively.

Since there is no Ohio law on this issue, we have examined law from other jurisdictions and found only four cases that directly address the issue whether Dixon

may be applied retroactively. They uniformly conclude that it can. They are: United States v. Cruce (C.A.5, 1994), 21 F.3d 70; State v. Kurzawa (Wis.1994), 509 N.W.2d 712, certiorari denied (June 20, 1994), unreported; People v. Miller (Ill.App.1994), 626 N.E.2d 759; Hernandez v. Superior Court of Arizona (May 19, 1994), Arizona App., Division One, No. 1 CA-SA 93-0314, unreported.

All four of these cases rely upon Griffith v. Kentucky (1987), 479 U.S. 314, 107 S.Ct. 708, in which the United States Supreme Court held that Batson v. Kentucky (1986), 476 U.S. 79, 106 S.Ct. 1712 (prohibiting the use of peremptory challenges based on race), could be applied retroactively. It stated: "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule consti-

tutes a 'clear break' with the past." Griffith, supra, at 328, 107 S.Ct. at 716. The court reasoned that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication ***," and that "selective application of new rules violates the principle of treating similarly situated defendants the same." Id. at 322-23, 107 S.Ct. at 713.

In Griffith, the case applied retroactively expanded the rights of the defendant. However, courts have relied upon Griffith to retroactively apply cases that restrict the rights of the defendant, finding that the same goals of doing justice in each case and treating similarly situated defendants similarly were served. See United States v. Santamaria-Hernandez (C.A.9, 1992), 968 F.2d 980; United States v. Sanchez (C.A.9, 1991), 944 F.2d 497; Miller, supra, citing State v. Smith (Ill.1983), 447 N.E.2d 809.

Nevertheless, as pointed out by the Wisconsin Supreme Court in Kurzawa, simply applying Griffith does not end the inquiry. In that case, the state relied upon Griffith in arguing that Dixon could be applied retroactively since the case was in the "direct appeal pipeline" when Dixon was decided. The Wisconsin court concluded that Griffith was not dispostive since retroactive application of new law raises "ex post facto concerns." Kurzawa, supra, at 716.

While the Ex Post Facto Clause itself does not apply to actions of the judicial branch, judicial decisions applied retroactively can violate the Due Process Clause. Marks v. United States (1977), 430 U.S. 188, 97 S.Ct. 990; Bouie v. Columbia (1964), 378 U.S. 347, 84 S.Ct. 1967. " [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law ***." Bouie, supra, at 353, 84 S.Ct. at 1702.

The United States Supreme Court's latest pronouncement on the Ex Post Facto Clause is Collins v. Youngblood (1990), 497 U.S. 37, 110 S.Ct. 2715. In that case, the court quoted the definition of an ex post facto law stated in Beazell v. Ohio (1925), 269 U.S. 167, 46 S . Ct. 68, which includes any law that "deprives one charged with crime of any defense available according to law at the time when the act was committed ***." Collins, supra, at _ , 110 S.Ct. at 2719.

It then stated that "[t]he Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."

In Collins, the court overruled two of its previous cases. One of those cases, Kring v. Missouri (1883), 107 U.S. 221, 2 S.Ct. 443, involved a Missouri law that abrogated a previous law which said that a defendant's

guilty plea to second-degree murder, if accepted by the prosecutor and the court, served as an acquittal of the charge of first-degree murder. In Kring, the court found this to be an ex post facto law using a definition which included any law "which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." Kring, supra, at 228-229, 2 S.Ct. at 449-50. In overruling Kring, the Collins court stated:

> It is possible to reconcile Kring with the numerous cases which have held that "procedural" changes do not result in ex post facto violations by saying that the change in Missouri law did not take away a "defense" available to the defendant under the old procedure. But this use of the word "defense" carries a meaning quite different from that which appears in the quoted language from Beazell, whether the term was linked to the prohibition on alterations in "the legal definition of the offense" or "the nature or amount of the punishment imposed for its commission." *** The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge; it had changed its law respecting the effect of a guilty plea to a lesser included

offense. The holding in Kring can only be justified if the Ex Post Facto Clause is thought to include *** any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule Kring.

Collins, supra, at , 110 S.Ct. at 2723.

The court also overruled Thompson v. Utah (1898), 170 U.S. 343, 18 S.Ct. 620, to the extent it rested on the Ex Post Facto Clause and not the Sixth Amendment. In Thompson, the court had held that a law reducing the size of juries in criminal cases from twelve persons to eight deprived the defendant of a substantial right and materially altered the situation to his disadvantage and was therefore an ex post facto law. The Collins court stated that "[t]he right to a jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punish-

ments, which is the concern of the Ex Post Facto Clause." Id. at _____, 110 S.Ct. at 2724.

We have examined cases interpreting Collins. In United States v. Brechtel (C.A.5, 1993), 997 F.2d 1108, 1113, certiorari denied (1993), U.S. , 114 S.Ct. 605, the court referred to the Beazell definition of an ex post facto law and stated that "[o]nly statutes withdrawing defenses related to the definition of the crime, or to the matters which a defendant might plead as justification or excuse fall within the latter group." The court in United States v. Knipp (C.A.6, 1992), 963 F.2d 839, used a similar analysis. In that case, the defendants argued that Congress' decision to extend the statute of limitations for their crime from five to ten years violated the Ex Post Facto Clause since the prosecution would have been barred under the five year statute. The court stated that "[p]leading an expired limitations period is certainly a defense in the general

sense that it is a defensive measure. More particularly, however, it is a matter in bar of prosecution and as such is distinguishable from a 'pure' defense, which defeats one or more elements of the crime." Id. at 843. The court then quoted the language in Collins overruling Kring and stated:

> Thus, "defense" as used in Beazell means a defense related to the definition or elements of the crime. It does not have the much broader meaning assigned to it by defendants, because a plea in bar is not related to the definition of a crime and is not pleaded as a nullification of one or more of its elements or as an excuse or justification for its commission .

Id.

In State v. Luff (1993), 85 Ohio App.3d 785, 792-93, certiorari denied (1994), ___ U.S. ___ , 114 S.Ct. 1116, the only Ohio case citing Collins, the Court of Appeals for Lucas County found that retroactive application of a statutory change in the definition of insanity violated the Ex Post Facto Clause. Although

it cited the Beazell language from Collins, it did not examine the supreme court's definition of the word "defense." Nevertheless, the court's conclusion is consistent with the Federal courts' interpretation of Collins. The insanity defense is an excuse or justification for the commission of the offense, not merely a "matter in bar of prosecution," and is therefore a "defense" as that term is defined in Collins.

Applying Collins to the present case, we conclude that appellee's claim of double jeopardy is not a "defense" as that term is defined in Collins. Therefore, applying Dixon retroactively would not act like an ex post facto law and would not violate appellee's right to due process. Accordingly, pursuant to Griffith and Collins, we hold that Dixon may be applied retroactively even though the offense occurred prior to the time it was decided.

Despite appellee's numerous arguments to the

contrary, we find that applying the Blockburger "comparison of the elements" test as mandated by Dixon is dispositive of the appeal. Failure to control and aggravated vehicular assault each require proof of an element that the other does not and therefore prosecutions for both offenses do not violate the double jeopardy clause. Accordingly, we find that the trial court erred in dismissing the indictment. We sustain the state's assignment of error, and we remand the case for further proceedings.

In appellee's cross-appeal, he raises two assignments of error. In his first assignment of error, appellee states that the trial court erred in failing to dismiss the physical harm specification. In appellee's second assignment of error, he states that the trial court erred in overruling his motion to suppress. However, neither the denial of a motion to dismiss the indictment based upon an allegedly improper specification nor the

denial of a motion to suppress is a final appealable order. State v. Hawkins (1986), 30 Ohio App.3d 259; State v. Wetzel (1963), 118 Ohio App. 368; Cleveland v. Iacampo (Dec. 27, 1990), Cuyahoga App. No. 57796, unreported. See, also, State v. Crago (1990), 53 Ohio St.3d 243, certiorari denied (1991), 499 U.S. 941, 111 S.Ct. 1399. Appellee cannot "bootstrap" his appeal of orders that are not final onto the state's appeal. Since any number of events could occur once this case is remanded to the trial court, we conclude that to address appellee's assignments of error would be to render an advisory opinion. Therefore, we dismiss the cross-appeal.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed in part, reversed in part and this cause is

remanded for further proceedings according to law and not inconsistent with this decision.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

To all of which appellant and appellee, by their counsel, except.

WALSH, P.J., KOEHLER and YOUNG, JJ.

APPENDIX B

THE SUPREME COURT OF OHIO

1994 TERM

To wit: December 7, 1994

State of Ohio, Appellee,	)	Case No. 94-1829
v.	)	ENTRY
Michael J. Crawley, Appellant.	)	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Thomas G. Eagle Co., L.P.A.

(Warren County Court of Appeals; No. CA9309072)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX C

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

STATE OF OHIO
Plaintiff,

vs.

MICHAEL J. CRAWLEY

Defendant,

CASE NO. 92CR-15579

DECISION AND
JUDGMENT ENTRY

This matter is before the court upon the defendant's **MOTION FOR RECONSIDERATION**. While the court agrees that this procedure is not formally recognized in the law, the court believes that it may change its decision prior to the entering of a final judgment.

The court has now had the opportunity to hear some evidence and to rule upon a motion to suppress. The court has also re-read the Transcript of Proceedings of the preliminary hearing which was

held on December 3, 1992.

In that hearing, counsel carefully reviewed with Trooper Hall the precise acts of the defendant which constituted his failure to control, an offense which has been adjudicated. Included in this conduct was going left of center, going right and then back left, and the way the vehicle was stopped. (Tr.p. 60).

Other witnesses at the preliminary hearing opined that there appeared to be a head-on collision (Tr.p. 4-Chenault) caused by the defendant going left of center and striking the victim. (Tr.p. 21-Stumpf).

This court previously expressed its opinion that "... there remains independent evidence, i.e., the defendant's alleged intoxication, which could prove recklessness." (**DECISION AND JUDGMENT**, 4/20/93, p.2). The court finds that

this finding is still valid as to that limited issue. However, that issue does not exist in a vacuum

O.R.C. 2903.08 (A) reads as follows:

> "No person, while operating or participating in the operation of a motor vehicle, ... shall recklessly **cause** serious physical harm of the type described in division (E)(2) or (5) of section 2901.01 of the Revised Code to another person." (emphasis added).

The state would be required to present evidence that the defendant caused the serious physical harm. The court's instructions would state:

> "Causation is an act or failure to act which in the natural and continuous sequence **directly** produces the serious physical harm, and without which it would not have occurred. Cause occurs when the serious physical harm is the natural and foreseeable result of the act or failure to act." (emphasis added).

This court must conclude that even if the defendant would be found reckless by virtue of the

alleged DUI, that recklessness cannot cause serious physical harm until the defendant crosses the centerline, thereby colliding with the victim. If the defendant was intoxicated and he continued eastbound within his lane of traffic, the charge against him could not survive.

It has been clearly established that the defendant operating his vehicle left of center and weaving across the centerline and where he stopped it are the underlying bases of the charge of "failure to control." Under double jeopardy standards, this same conduct is precluded from use in prosecuting this indictment. The court can conceive of no independent set of facts that the state can present presenting evidence of "causation" which have not been already precluded.

While the defendant's criminal culpability should be determined in a public forum by his peers,

the court finds that the circumstances are such as to warrant a dismissal as a matter of law.

/s/
Neal B. Bronson, Judge

JUDGMENT ENTRY

This matter is before the court upon a **MOTION TO DISMISS**. The court finds that this case cannot be prosecuted without a violation of the double jeopardy clause. The within indictment is therefore ordered dismissed.

/s/
Neal B. Bronson, Judge
Common Pleas Court

copies to:
Jim Beaton
Tom Eagle

C-6

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

STATE OF OHIO
Plaintiff,

vs.

MICHAEL J. CRAWLEY

Defendant,

CASE NO. 92CR-15579

DECISION AND
JUDGMENT ENTRY

This matter is before the court upon the defendant's **MOTIONS TO DISMISS.**

DOUBLE JEOPARDY

The defendant contends that to allow the prosecution to proceed to trial would violate his Fifth Amendment guarantee against being placed twice in jeopardy.

The defendant was convicted in the Warren County Court of Failure to Control in violation of O.R.C. 4511.202. In essence, this statute precludes operating a motor vehicle "without being in reasonable control of

the vehicle."

The defendant has cited the court to certain testimony from his preliminary hearing. In that testimony, Trooper Hall was asked to describe the defendant's failure to control. Through properly leading questions the trooper acknowledged it as the defendant's "going left of center," "going right and then back left" and "stopping the vehicle." (Tr-p60).

When asked to described the "recklessness," he included "the whole totality," that is, "the DUI" and "the failure to control." (Tr-p61). Previously in his testimony, when responding to a question as to reckless conduct, the witness answered "Driving a car period while under the influence of alcohol." (Tr-p59).

In **State v. Dudock**, 6 O. App.3d 64, the Court of Appeals for Summit County adopted a

holding of an unreported case that allows reckless conduct to be inferred solely from driving while intoxicated.

The United States Supreme Court in **Illinois v. Vitale**, 447 U.S. 410, rejected a double jeopardy argument where it was uncertain that the State would seek to rely on all of the ingredients necessarily included in the traffic offense. However, the court did go on to say:

> "... if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution."

The testimony elicited indicates a number of factors alleged to comprise recklessness. In the cases cited by the defendant, **Grady v. Corbin**, 495 U.S. 508 and **State v. May**, Court of Appeals,

Coshocton County, unreported Case No. 85-CA-7, the defendants were charged with all encompassing conduct. In the former case, it was DUI and failing to keep to the right of the median. In the latter case, it was DUI and failing to drive on the right side of the roadway. Thus, there was nothing within this "whole totality," as Trooper Hall described it, upon which to base recklessness, and of which the defendant had not already been convicted.

In the case before this court, there is certain conduct, which if tread upon by the prosecution would trigger a double jeopardy argument. However, there remains independent evidence, i.e., the defendant's alleged intoxication, which could prove recklessness. How this can be done will indeed pose great difficulities to the state. The court finds, however, that such a possibility exists. This motion is hereby overruled.

VAGUENESS

The court concurs with the holding of the Cuyahoga County Court of Appeals in **State v. Morris**, unreported Case No. 51279. The court finds that the language of the statute describing "serious physical harm" is plain enough to be understood, and must be construed in favor of its validity. The defendant has not satisfied this court beyond doubt of the statute being unconstitutionally vague.

ALLIED OFFENSE

For reasons similar to those addressing the defendant's double jeopardy argument, the court finds this motion not well taken, and hereby overrules it.

Judgment accordingly.

/s/
Neal B. Bronson, Judge
Common Pleas Court

copies to:
Thomas G. Eagle
James Beaton